FILED
AUG - 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ROBERT ROBERTS, JR.
MARLIN RISINGER, JR.
W. MICHAEL ADAMS
BLANCHARD, WALKER, O'QUIN & ROBERTS
Post Office Drawer 1126
Shreveport, Louisiana 71163

Counsel for Petitioner

Of Counsel:

REUBEN GOLDBERG
GLENN W. LETHAM
GOLDBERG, FIELDMAN & LETHAM, P.C.
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

August 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

Arkansas Louisiana Gas. Co. v. Hall, et al., FERC Docket No. RI76-28	2
Ashland Oil & Refining Co. v. F.P.C., 421 F.2d 17 (6th Cir. 1970)	5
Atlantic Richfield Co. v. Northern Natural Gas Co., No. CA3-76-1548-G (N.D. Tex. Dec. 5, 1977)	5
City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979)	6
Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581 (1945)	5
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	1
Evco v. Jones, 409 U.S. 91 (1972)	9
Hughes Tool v. Trans-World Airlines, 409 U.S. 363 (1973)	5
Independent Oil & Gas Association of W. Virginia, F.E.R.C. Op. No. 77 (March 4, 1980)	7
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	5, 6
Northern Natural Gas Co. v. Kansas Corp. Comm., 372 U.S. 84 (1963)	5
Shell Oil Co., 29 F.P.C. 498 (1963)	7
Socony Mobil Oil Co. v. Brooklyn Union Gas Co., 299 F.2d 692 (5th Cir. 1962), cert. den. 371 U.S. 887 (1962)	5
Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., —— U.S. ——, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)	5

No. 79-1896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

A.

Respondents' brief opposing certiorari in this case must certainly be unique in that it does not refer to, discuss, nor attempt to justify [1] the Louisiana Court of Appeal's opinion and decree which we seek by our petition to reverse. That judgment, entered January 22, 1980, was the *first* judgment of the Louisiana courts for a sum of money ($2,700,000, with interest) which survived the appellate process in Louisiana. The other judgments of the Louisiana courts which Petitioner has sought to have reversed here, on certiorari, in No. 78-986 and in No. 78-1789, adjudged liability and remanded the case to the trial court for determination of amount.[2]

On the facts found by the Louisiana appellate court (App. C, pp. 105a, *et seq.*, discussed at Petition, pp. 13, *et seq.*), it is certain that the amount of the judgment sought to be reviewed here, representing the price of interstate natural gas sold by Respondents to Petitioner for resale, exceeds by a very large amount the maximum prices for that gas permitted under the Natural Gas Act by the Federal Energy Regulatory Commission's regulations.

Neither the Louisiana Court of Appeal in its opinion nor Respondents in their brief here has even attempted to reconcile the state court's judgment with the Natural Gas Act. Adverting again to the fact that prior to January 22, 1980, there was never in this suit a judgment of a Louisiana appellate court, based on specific facts and for a specific sum of money, we call this Court's attention to the fact that Respondents' argument against our specification of the amount of this judgment as error consists solely

---

[1] Otherwise than by the formal chronology of the proceedings contained on page 10 of Respondents' brief.

[2] The rule, as to finality of a state court judgment, illustrated by this Court's decisions in cases such as *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975), seems to indicate that Petitioner was required to treat these earlier decisions of the Louisiana courts as final and reviewable.

(aside from conclusory rhetoric) of the quotation from a number of documents, all of which antedated the judgment under review.

Excerpts from these documents selected by Respondents reflect the regulatory principle that Respondents cannot collect a rate in excess of the just and reasonable rate established by the Federal Energy Regulatory Commission. The issue of whether or not the rate increase awarded by the Louisiana state courts, when added to the existing rate, exceeds the just and reasonable rate is currently pending at the Federal Energy Regulatory Commission in Arkansas Louisiana Gas Co. v. Hall, *et al.*, Docket No. RI76-28.

B.

Respondents have devoted a section of their brief in opposition to the grant of certiorari to a futile attempt to demonstrate that:

> ". . . the Federal Energy Regulatory Commission has now fully performed its Section 4 (d) 'review function' with respect to respondents' 'severable' and 'contractually authorized prices' for their dry or residue gas under the 1952 private contract . . ."

and that their request to the Federal Energy Regulatory Commission for a waiver of the filing requirement of Section 4 of the Natural Gas Act will be granted.

Petitioner would observe that the Federal Energy Regulatory Commission has not yet acted on Respondents' waiver application. Until action is taken on Respondents' waiver application, it is difficult to understand the basis for Respondents' claim that the Federal Energy Regulatory Commission has "fully performed its Section 4(d) 'review function' " of the just and reasonable nature of the rate increase awarded by the state courts. Respondents themselves argue that their waiver application requires the Federal Energy Regulatory Commission to determine that the rate increase is just and reasonable. Resp. Brief, p. 20. Furthermore, Respondents' contention that they sold

"dry or residue gas" under their contract wholly ignores the finding of the Louisiana Court of Appeal which is directly to the contrary. The holding of the Louisiana Court of Appeal is that Respondents' contract provided for a price for gas including the liquefiable content confirming Petitioner's showing that the rate increase awarded by the state courts when added to the existing rate exceeds the just and reasonable rate.

We also call the Court's attention to the demonstration in our petition for certiorari and in No. 78-1789 (pages 8-10) that the judgment below contravenes the rate filing requirements of the Natural Gas Act and is therefore an unlawful intrusion by a state court upon a matter reserved for the federal administrative authorities. Respondents' application for a waiver of the filing requirements of the Natural Gas Act was made to the Federal Energy Regulatory Commission in order to circumvent these filing requirements. In response to this Court's invitation in No. 78-1789, the Solicitor General filed a brief which stated:

> "As we stated in our Brief as Amici Curiae in No. 78-986 (at 15-17), we believe the Supreme Court of Louisiana erred in holding that respondents are entitled to damages from petitioners for the period from 1961 to 1972. This holding, we believe, is contrary to a basic and well established principle of rate regulation known as the filed rate doctrine, under which a person 'can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

The Solicitor General also stated in his conclusion that, because the filed rate doctrine is an important principle of federal regulation, the Louisiana court's decision ignoring that doctrine should not be allowed to stand.

Respondents' brief relies wholly on quotations from orders of the Federal Power Commission and its successor, the Federal Energy Regulatory Commission, which were included in their opinions declining to exercise jurisdiction in passing on the interpretation of the rate contract in-

volved. The statements in the Commission's orders "that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract" were made upon the basis of Respondents' arguments that the state courts had so interpreted the contract. Resp. Br., pp. 13-14. The judgment of which we now seek review is a direct holding to the contrary—that is, that the contract provided for a price for gas including the liquefiable content.[3] A similar situation exists concerning the Commission's earlier statement that the rates requested "are within what the Commission has determined to be the zone of reasonableness." This statement was made on the basis of Respondents' characterization of the state court claim which has been shown to be in error.[4]

Those statements, which were set forth as grounds for the Commission's conclusion to decline to exercise jurisdiction, have been conclusively proved by the judgment of January 22, 1980, of the Court of Appeal to be erroneous. They furnish no basis for this Court to permit the judgment for a sum greatly in excess of the prescribed ceiling rates under the Natural Gas Act to stand.

We remind this Court that Respondents have never filed a rate change, and that the issues of the Federal Energy Regulatory Commission's obligation to exercise jurisdiction and of whether Respondents' sales contract contains

---

[3] The Commission never interpreted the contract because it deferred the exercise of its jurisdiction to permit the Louisiana state courts to construe in the first instance this aspect of the pricing provision of Respondents' contract. Respondents subsequently argued before the Commission, as they have here, that the state courts had interpreted their contract as providing for a price for dry gas and a separate price for the products removed from the gas. The January 22, 1980, judgment clearly disproves Respondents' reading of the prior state court opinions. This matter was recently brought to the attention of the Federal Energy Regulatory Commission in connection with the parallel proceeding pending in Docket No. RI76-28.

[4] Again this matter is also pending before the Commission in connection with Respondents' waiver application.

a rate escalation provision which has been activated are still pending in the petition for certiorari in No. 78-1789.[5]

We are not familiar with any decision of the Federal Energy Regulatory Commission or of its predecessor, the Federal Power Commission, or of the federal courts, in which the Commission has waived the requirement of Section 4 of the Natural Gas Act that a change in rate be filed, and that the Commission authorize the new rate to take effect without construing the contract and holding that the rate change provided by the contract is fair and reasonable. Respondents' application for waiver blurs the distinction between a waiver of the rate change filing requirement of Section 4 and a waiver of the requirement that notice of the change be given to the Commission and the public. If, in the present case the Commission should waive the notice requirement, *Respondents would still be under the legal necessity of filing a rate change and the Commission would have to pass on whether the rate change was authorized by the contract and was fair and reasonable. Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, 372 U.S. 84 (1963); *Ashland Oil & Refining Co.* v. *F.P.C.*, 421 F.2d 17 (6th Cir. 1970); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692, 695 (5th Cir. 1962), *cert. den.* 371 U.S. 887 (1962); *Atlantic Richfield Co.* v. *Northern Natural Gas Co.*, No. CA3-76-1548-G (N.D. Tex. December 5, 1977), *appeal docketed*, No. 78-1112 (5th Cir.).[6] The Commission has no authority to waive the statutory filing requirement of the Natural Gas Act. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

---

[5] Moreover, the denial of certiorari in No. 78-986 (October 1, 1979) occurred at an interlocutory stage of these proceedings so that it need not and should not be treated as a final adjudication of this issue. *Hughes Tool* v. *TransWorld Airlines*, 409 U.S. 363 (1973); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, —— U.S. ——, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

[6] See Appendix p. 1a, Reh. Pet. in No. 78-986.

The decision of the United States Court of Appeals for the District of Columbia Circuit in which it affirmed the Federal Energy Regulatory Commission's order waiving the prospective notice requirements is reported under the title *City of Piqua, Ohio* v. *F.E.R.C.*, 610 F.2d 950 (D.C. Cir. 1979). The following extract from the court's opinion explains that in a proper case *where the Commission has found the new rates to be just and reasonable, and justified by the contract between the parties,* it can, upon showing of good cause, waive the prospective notice requirement, 610 F.2d 950, 954-955:

> "The present situation is immediately distinguishable. In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract. Filing under section 205(d) allowed the Commission to review the agreement to ensure its reasonableness. Such review does not, when good cause is shown, however, preclude enforcing the contract provision as of the date specified therein. Moreover, the Commission in finding the Agreement reasonable, did not retroactively substitute a rate; it merely approved the rate change and effective date agreed upon by the parties.
>
> "As part of its retroactivity argument, Piqua also challenges the waiver as inconsistent with the 'filed rate doctrine' as described in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951): '[a utility] can claim no rate as a legal right that is other than the filed rate . . . .' This court, in discussing the doctrine, stated: 'The considerations underlying the [filed rate] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the Agency has been made cognizant.' *City of Cleveland* v. *FPC*, 174 U.S.App.D.C. 1, 10, 525 F.2d 845, 854 (1976). This purpose is unaffected by the Commission's waiver of the notice requirement upon good cause, thus allowing rate changes, *found by the Commission to be just and reasonable,* to become effective on the date agreed by the parties." (Emphasis added.)

If the Commission should in this proceeding waive the prospective notice requirement of the Natural Gas Act, it would still be required by law to pass on the interpretation of the favored nation provision and whether the changed rate is (or was) fair and reasonable,[7] and otherwise apply its established rules to any order which might permit the rate to become effective. See *Shell Oil Co.*, 29 F.P.C. 498, 499-500 (1963) (F.P.C. Opinion No. 382); *Independent Oil & Gas Association of W. Virginia, Opinion and Order,* (March 4, 1980), Docket No. RI74-188, *et al.,* (Opinion No. 77).

C.

The remainder of Respondents' brief is a transparent attempt to divert the Court's attention from the unlawful and excessive rate increase issue. Completely outside the record and without any apparent connection with any fact or issue in the suit, Respondents catalogue the financial strengths of Petitioner.[8] Petitioner does not understand

---

[7] Petitioner has shown that the rate increases awarded by the state courts, when added to the existing rates, substantially exceed the applicable ceiling rates prescribed by the Commission.

[8] The following examples illustrate Respondents' misstatements: On page 3, footnote 1, they say that during the *14* years 1961-1975 (sic), Petitioner was withholding the true facts from them, it amassed 1 billion dollars in "private corporate assets"; from the Company's published annual reports, it appears that in the *15* years from 1961 to 1975, its assets increased from $228 million to $672 million.

Respondents say that in the period Petitioner "grossed over $5 billion in private corporate earnings" and "reaped over $1 billion in excessive corporate earnings." In the 15-year period, the total of Petitioner's earnings was $415 million, the highest in any year was $49 million and the average was $28 million per year.

Respondents say that in the period Petitioner distributed $275 million in dividends; the actual amount was $215 million, an average of 14¼ million per year. On page 8 Respondents changed their figures somewhat and assert that Petitioner's "own excessive private corporate profits were over $120 million each year" and that it distributed to private stockholders each year "over 35 million dollars," whereas in the 15-year period the highest yearly distribution was $18 million and the average was $14 million.

the relevance of these statements or the point which Respondents seek to make. Petitioner's rates are fully regulated by the Federal Energy Regulatory Commission at the federal level and by the several state utility commissions where Petitioner is involved in intrastate business. Petitioner's rates to its customers have tracked the cost of gas it has paid to Respondents in accordance with the Federal Energy Regulatory Commission's regulations.

Nor is there any perceptible reason in the strategy of Respondents' argument for them to assert, in almost every paragraph of their brief, Petitioner's alleged fraud of concealment from them of the facts of the contract escalation. The Supreme Court of Louisiana held that Petitioner, by failing to inform Respondents of their rights (of which Petitioner knew nothing), had become legally responsible to pay them an additional price for their gas under the escalation provision of their contract; and this, notwithstanding that Petitioner had not been guilty of fraud. That court said:

> "The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud." 368 So.2d 984, 993.

The Louisiana Court of Appeal made a similar finding, saying:

> "The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation." 359 So.2d 255, 263-264.

Respondents have printed, as a part of the appendix to their brief, a random selection of letters taken out of the context of the correspondence. These letters were before the Louisiana courts, which absolved Petitioner of any intention to mislead Respondents, together with the corre-

spondence of which they were a part and the testimony of the authors of the letters. While Respondents make no reference to these letters in their brief, it is obvious that they would like them to bolster their insinuations of fraud. This Court, we are sure, does not intend to review here the state courts' findings of fact.[9]

CONCLUSION

Respondents' argument needs only to be understood to be rejected out of hand. Respondents contend that their contract provided for separate prices for dry gas (*i.e.* natural gas after extraction of liquefiable hydrocarbons) and for extracted liquid hydrocarbons and that the Federal Energy Regulatory Commission's ceiling rates apply only to dry gas. Respondents ignore the fact that they have sold no extracted liquids to Petitioner, but rather, under the Court of Appeal's interpretation, have sold wet gas (*i.e.*, gas containing liquefiable hydrocarbons).

When natural gas is produced it contains liquefiable hydrocarbons as part of the wellhead stream. These liquefiable hydrocarbons in their gaseous phase are contained in varying degrees in all natural gas. The Commission's regulations prescribe rates for natural gas and set minimum quality standards. These rates apply to the natural gas whether wet or dry and there is no provision for a higher rate for wet gas. Producers get the same price for wet gas as for dry gas.[10] There is no doubt that the liquefiable hydrocarbons in wet gas can be extracted and sold as a separate product.[11] That, however, was not the case here

---

[9] Under this Court's decisions, findings of fact of a state court will be accepted by this Court in the absence of a constitutional issue or other exceptional circumstances; *Evco* v. *Jones*, 409 U.S. 91 (1972).

[10] There is an upward and downward adjustment for gas of higher heat value (Btu content) in some cases. However, that provision does not apply here.

[11] The extraction and processing of liquefiable hydrocarbons involves a substantial economic cost. After processing, however, extracted liquids have an economic value as a separate product in their liquid form.

because Respondents sold wet gas to Petitioner. Respondents' argument that their sale of gas is only partially regulated is directly contrary to the Commission's rate regulations which apply to the *entire* gas stream including liquefiable hydrocarbons. See Petition, pp. 16-22.

The judgment of the Court of Appeal ignores the Commisison's regulations as they apply to a sale of wet gas. Under the judgment Respondents obtain a rate for the sale of wet gas by reference to the market value of extracted liquid hydrocarbons in addition to the price for gas. This rate calculation awards Respondents a rate which is almost twice the *maximum* price permitted by the Commission.

This case presents important questions in the administration of the Natural Gas Act which involve a direct conflict between federal law and the application by state courts of local policy and law, as we pointed out in our petition (p. 23). We do not find in Respondents' brief any effort to address these problems; and surely the state courts should not be permitted to render a judgment in flagrant violation of the Natural Gas Act and price regulations of the Commission.

Respectfully submitted,

ROBERT ROBERTS, JR.
MARLIN RISINGER, JR.
W. MICHAEL ADAMS
BLANCHARD, WALKER, O'QUIN
& ROBERTS
Post Office Drawer 1126
Shreveport, Louisiana 71163

Counsel for Petitioner

Of Counsel:

REUBEN GOLDBERG
GLENN W. LETHAM
GOLDBERG, FIELDMAN & LETHAM, P.C.
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

August 1980